85-2007

Supreme Court, U.S.
FILED
JUN 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-

In the Supreme Court of the United States

OCTOBER TERM, 1985

DOUGLAS M. SUMNER,
Petitioner,

vs.

YODER TOWNSHIP, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

RICHARD J. ROME
(*Counsel of Record*)
Attorney at Law
421 West First, Suite C
Post Office Box 964
Hutchinson, Kansas 67504-0964
(316) 662-2383
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW

Did the Kansas Supreme Court's approval of the assumed authority or jurisdiction over a road and the selective enforcement of K.S.A. 68-115 and K.S.A. 80-307 by the Respondents constitute a violation of the Petitioner's right under the U. S. Constitution to due process and equal protection of the law?

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Unpublished opinion of the Kansas Court of Appeals, reported at 10 Kan. App. 2d Advance Sheets, No. 9 (VI) A2

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

OPINION BELOW

The order of the Kansas Supreme Court denying review is reported at 238 Kan. Advance Sheets, No. 3 (VI), and attached hereto as Appendix A. The unpublished opinion of the Kansas Court of Appeals is reported at 10 Kan. App. 2d Advance Sheets, No. 9 (VI), and attached hereto as Appendix B.

JURISDICTION

The opinion of the Kansas Court of Appeals was filed November 21, 1985. The order of the Kansas Supreme Court denying review was filed January 24, 1986.

This Court's jurisdiction is invoked under 28 U.S.C. 12.57(3). The instant petition for a writ of certiorari is filed within the period of extension granted by Associate Justice Byron R. White on April 17, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Douglas M. Sumner, lives at Rural Route 4, Hutchinson, Reno County, Kansas. In March of 1981, and to the present time, the Petitioner resides in Yoder Township and pays taxes there. He is the Plaintiff in Reno County, Kansas, District Court Case No. 81 C 219, *Douglas M. Sumner vs. Yoder Township, et al.* Mr. Sumner lives at this rural location with his wife and family. His home and property abut or adjoin a road commonly known as "Obee Road", on the east side, and his total acreage is about two acres. Mr. Sumner's property extends or affronts approximately 170 feet along "Obee Road". There is a "right-of-way easement" shown in the abstract of title of Mr. Sumner's property.

Sometime in March or early April of 1981, Mr. Sumner erected about one hundred thirty fence posts around his property. Eleven of those posts were erected on the 170 feet of frontage on Sumner's property on the east side of "Obee Road".

"Obee Road" is a dirt road "maintained" at the whim of the Respondent, Yoder Township. The Township

claimed, and claims, a 60-foot right-of-way for the road, with a 30-foot easement on both the east and west side of the road. The actual traveled portion of the "Obee Road" is very difficult to determine at a given time, often depending upon the accuracy or inaccuracy of the road grader. In the early months of 1981, Mr. Sumner and his wife were concerned for the safety of their minor daughter and wanted to keep her in the yard because of "Obee Road's" obscurity. Since the Respondent Township either failed to, or was unable to, maintain "Obee Road" as a safe roadway for its patrons, and after repeated requests for them to do so failed, the Sumners decided to erect the wooden fence on their property, and did so as stated earlier above.

The eleven fence posts in question were placed from six to eight feet from the traveled portion of the "Obee Road". The posts were never in the traveled portion of the roadway. They did not impede the flow of traffic. Normally, the roadbed was, depending upon the road grader and the day of the week, about twenty to twenty-five feet wide.

A week or so after the posts were in place, one of the Respondents, Mr. Dean Eales, a Yoder Township treasurer, entered Petitioner's property and advised the latter that the posts were in his way as well as the public's, that they would not be allowed, that he would see to it that they were removed, and that "farmers do what they damn well please in the country". Eales further advised Petitioner that he would "find that out soon enough". True to his word, Respondent Eales and the remainder of the Respondent Township Board caused a letter to be mailed to Petitioner requesting that the posts be removed by April 6, 1981, and that they constituted a hazard. The letter was

dated March 19, 1981. Petitioner then attended the next regularly scheduled Yoder Township meeting on March 13, 1981. At that meeting, Petitioner repeatedly requested the Respondent Board to advise him why his posts constituted a hazard, if it was their standard policy to treat this type of situation as he was treated, and where he could place the posts to their satisfaction. The Respondent Board did not answer Petitioner's questions, and, in particular, they would not tell him where he could place the posts to their satisfaction.

On April 25, 1981, the wife of Petitioner, Carol Sumner, was present on the property with her daughter, when employees of the Respondent Township entered the property and removed the fence posts against her will. Mrs. Sumner had called the Reno County Sheriff's Department, and was advised that an officer was on the way. The officer was Steve Chambers. Prior to Deputy Chambers' arrival, Mrs. Sumner asked the township employees to remove themselves from her property and to leave her property alone. Mrs. Sumner asked for proof of a court order to enter upon or remove anything from her property. She was shown none.

After Deputy Chambers arrived, Mrs. Sumner asked him to stop the township men from interfering with her property. He replied that he could not. Finally, she was able to urge Deputy Chambers to call the Reno County Attorney, Respondent, Joseph P. O'Sullivan III. Mr. O'Sullivan, Respondent herein, told Deputy Chambers "to keep" Mrs. Sumner "out of the way," and that ". . . the property belonged to the County and that they had the right to remove" it, "and that he was there to stop" her "from doing anything". As a result of Mr. O'Sullivan's directions to Deputy Chambers on the phone, Mrs.

Sumner had no choice than to watch the township men remove the posts and lay them down. She was advised she would be in trouble if she did anything. It is interesting to note that Mrs. Sumner was in no shape to hassle the two township men and Deputy Chambers since she was eight months pregnant at the time. She did not wish to take any chances with the unborn child at that time.

The posts were finally uprooted and placed upon the Sumner property. Very shortly thereafter, within a few days, Mr. Sumner put the fence posts back up again in the same holes they had been removed from on April 15, 1981.

On May 22, 1981, the Appellant filed an action in the Reno County, Kansas, District Court, Case No. 81 C 219, *Douglas M. Sumner, Plaintiff vs. Yoder Township, Kenneth Bontrager, Trustee, Eldon R. Bontrager, Clerk, Berton Dean Eales, Treasurer, Joseph P. O'Sullivan, Reno County Attorney, and James Fountain, Reno County Sheriff, Defendants,* asking for a restraining order, a temporary injunction, and, ultimately, a permanent injunction against all of the Defendants (Respondents herein), enjoining them from entering his property, removing his fence posts, or otherwise interfering with his peaceable enjoyment of his property.

After the lawsuit was filed, the township again removed the posts from their holes within a month or so. The Respondent township had no court order to allow them to remove the posts a second time. The Petitioner, for the third time, put the fence posts back up again in August of 1981. This time the Petitioner replaced the eleven fence posts and also attached several side boards, one-by-sixes and two-by-sixes. The posts, without tax, cost $4.75 apiece. The total cost of the posts and the lumber was approximately $150.00.

Again, after the lawsuit was filed in May, 1981, the course of "Obee Road" began to change via the Respondent township's road grader. In fact, the course of the road suddenly came within a foot of the posts.

The Respondent township sent the Petitioner another written notice on October 13, 1981, advising him to remove the posts by October 19, 1981. Then, on October 20, 1981, four persons from the township entered Petitioner's property again, removed the posts, cut the boards, and removed all of it from Petitioner's property. Shortly thereafter, Respondent Eales advised Petitioner that the property had been taken to the dump where it was burned. An employee of the Reno County Public Works Department received the property at the County Burn Site from the Respondent township employees, who burned it in his presence. Petitioner again replaced the posts and fence about October 27, 1981. They remained up until December 3, 1981.

No accidents occurred on the "Obee Road" in front of Petitioner's property during the placement of his posts or fence.

On December 3, 1981, the case came on for hearing before Judge Porter K. Brown in Division I of the Reno County, Kansas, District Court, on requests by both Petitioner and the Respondent Township for temporary injunctions. At that hearing the Court dismissed Respondent O'Sullivan from the case. The Court found "Obee Road" to be an open road as of 1877. The Court denied the Petitioner's request for a temporary injunction. Finally, the Court ordered Petitioner to remove the fence posts for the time being.

Mr. Sumner, the Petitioner, abided by the order of Judge Brown from December 3, 1981, until the present.

The case was tried on its merits before Judge William F. Lyle, Jr. on July 26, 30, and 31, 1984. Judge Lyle found on July 31, 1984, that "Obee Road" had been officially opened for over 100 years, confirming Judge Porter K. Brown's finding of December 3, 1981.

At the conclusion of the Respondent township's case on December 3, 1981, the Court was concerned with whether or not the road had ever been opened officially pursuant to statute, and allowed them to recess or reopen to attempt to prove that portion of the case. The evidence presented by the Respondent township to show that the road was officially opened consisted of two records kept in the Reno County Engineer's office. One was a Bridge and Road record referring to action taken by the "Commissioners" opening section lines in *Clay Township* (emphasis supplied) for roads. The other record was a Road Records book showing the width of said road to be 60 feet. The property in question lies in *Yoder Township* (emphasis supplied). The Petition actually opening a road in Clay Township, much less Yoder Township, was not produced, or even the minutes of the Commission. Judge Brown made his finding based upon the above evidence and testimony.

At the trial of the case on July 26, 30, and 31, 1984, the same evidence was presented by the Respondent township. The original petitions to open a road are not present in either exhibit or book offered by the Respondent township. The Respondent township also offered copies of microfilmed County Commissioner minutes of July 6, 1872, declaring all section lines in Reno County opened as roads. The Respondent also offered copies of microfilmed Commissioners minutes for April 12, 1877, showing Road Petition No. 78 as granted and roads opened as prayed for.

Again, no attempt was made or presented to show the original petition to open any road, notices, objections, etc. The Petitioner attempted on repeated occasions to determine, from the Reno County Commission and the Register of Deeds, by documentation that "Obee Road" had been officially opened, but to no avail.

The trial Court permanently enjoined Petitioner from placing his fence posts on the right-of-way in the same manner as Judge Brown did on December 3, 1981. It also ordered the Respondent township to pay damages to the Petitioner in the total sum of $52.25.

REASON WHY THE WRIT SHOULD BE GRANTED

The Kansas Supreme Court's Approval Of The Assumed Authority Or Jurisdiction Over A Road And The Selective Enforcement Of K.S.A. 68-115 And K.S.A. 80-307 By The Respondents Constitutes A Violation Of The Petitioner's Right Under The U. S. Constitution To Due Process And Equal Protection Of The Law.

Petitioner contends that none of the Respondents, the Yoder township, Kenneth Bontrager, Eldon Bontrager, Berton Dean Eales, James Fountain, or Joseph P. O'Sullivan III, have a right to interfere in any way with the peaceful possession and enjoyment of his real property. He also contends that the Respondents failed to prove that the roadway in question was ever legally opened and established, thereby depriving all of the named Respondents of any right to interfere with his right to personally enjoy the use of his property.

The Respondents cited numerous cases, at the trial level herein, ranging from Kansas to Maine, certain treatises and various learned authorities to support their position. However, not one single cited case denies the fact that before any municipality, be it a city, a county, or a township, acts in the manner the Respondents did herein, a legally established road, street, or highway must be shown to exist. In fact, in every case cited by the Respondents, the question of whether or not a public road existed, had, in fact, been established. It is a generally accepted matter that must be proven in the type of case at bar.

Respondents have totally failed below, and herein, to reach this threshold question, and therefore their entire case must fail.

Looking at the other side of the coin, the Petitioner established beyond a shadow of a doubt that he is the owner of the property in question, and was engaged in the peaceful, private use and possession thereof. The Petitioner attempted repeatedly and on numerous occasions to have, not only the Respondents, but other County officials as well, show him the original Petition, or a copy thereof, praying for the opening of this road. All of this was to no avail. The Respondents have failed to the end to present that vital evidence to the Court. The Petition to open the road, and its accompanying notices, objections, and findings, would lay to rest any doubts as to the opening of the road.

There is no question that one of the attributes of sovereignty, inherent in the lawmaking power of the state in its police power, is the laying out of highways, streets and roads for the use of the public. See: (*New Orleans Gaslight Co. v. Louisiana Light and H. Producing and Mfg. Co.*, 115 U.S. 650, 29 L.Ed. 516, 6 S.Ct. 25. Ordi-

narily, that power is delegated to local authorities. Kansas has such a procedure to establish township roads, and has had since its inception, or at least since 1864.

K.S.A. 68-102 provides the statutory procedure for laying out roads by petition to the county commissioners. It must be signed by at least twelve householders of the county residing in the vicinity of the proposed road. A bond has to be posted to cover the costs and expenses. Notices must be given of the proposed vacation. Proceedings for the award of damages must be made. A hearing must be held to determine the validity of the petition. (K.S.A. 68-103 and K.S.A. 68-104). Viewers must be appointed and notice thereof given. After the viewers have performed, notices are again given and the hearing is held. There is a provision for appeal built into the statute. (K.S.A. 68-107).

All of the procedures outlined above must be conducted or have taken place before a road is officially opened. Before a temporary injunction issues, such as here, the persons seeking that extraordinary writ should be held on strict proof before they are allowed to interrupt the privacy of an individual and the free use of his property. The question is whether or not the Respondents have complied. The answer in unknown. The best evidence would be the production of the original petition and the procedures followed, or a microfilm reproduction. The only evidence produced is that of a minute of summation, a bridge and road summation, and a road record summation. All of those refer to a road in Clay Township —not Yoder Township! All of the authority of the Respondents rises or falls on the legality of the original opening and establishing of the road in question. It cannot be inferred by reference to collateral documents simply

because they are old. It cannot be assumed. It cannot be presumed. It must be proven, and the Respondents have failed therein.,

The Fourteenth Amendment to the U. S. Constitution prohibits the States from depriving any U. S. citizen "of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Due process and equal protection are also provided for in the Bill of Rights to the Kansas Constitution at Sections 18, and 2.

K.S.A. 68-115, referring to roads, provides in part that the:

> "township trustee . . . shall keep the same in repair, and remove or cause to be removed all obstructions that may be found therein . . ."

K.S.A. 80-307 also provides as follows:

> "The township trustee may remove obstructions from the highways in cases where the overseers shall refuse or fail to do so; . . ."

Under the Constitution of both the United States and Kansas, the above-quoted sections are to be uniformly and equally enforced as to all citizens. However, before they are enforceable, the township must prove that they have a legal road to begin with. In this case, the Respondents have failed to do this. However, even if said Respondents proceeded to operate from a false sense of authority or assumption, they have violated Petitioner's right to due process of the law and to the equal protection of the law.

First of all, did the Petitioner's placing of the fence posts in question constitute an obstruction under any inter-

pretation of 68-115 or 80-307? There is ample proof in the record below to indicate that it did not. The evidence has clearly shown that the posts in question did not constitute an obstruction to the natural flow of traffic on the roadway. They were well off the traveled portion of the road. They comply, or are in compliance with K.S.A. 8-1569, which obviously caused Judge Brown some problems at the December 3, 1981, hearing. Hindsight shows that the posts, up or down, have never caused an accident or even an incident, in four years.

The testimony at the December 3, 1981, hearing and at the July, 1984, trial shows clearly and beyond a shadow of a doubt that the township Respondents, the Respondent Sheriff, and the Respondent County Attorney openly allowed other patrons along "Obee Road" to maintain "obstructions" on the right-of-way. These "obstructions", included, but were not limited to, trees, shrubbery, electric fences, numerous mailboxes with posts, numerous newspaper boxes with posts, and even growing crops. Not one of these other patrons has been cited by the Respondent township, nor were they treated like the Petitioner. Not one of these patrons has been charged by the Respondent County Attorney during the four years. Not one of these patrons has ever been arrested for a violation in four years. This sort of picking and choosing on the part of all of the Respondents as to what does or does not constitute an obstruction is arbitrary and capricious, and should have been enjoined by the trial Court. Not so, in this case! In fact, Judge Lyle, as a response to a request by the Petitioner, viewed the entire area before making his decision. In his comments during the announcement of the decision, Judge Lyle admitted that he personally observed encroachments in the area. The Peti-

tioner testified as to the encroachments. One of the Respondents, Ken Bontrager, the township trustee, admitted that there was a fence row on the right-of-way just north of the Petitioner's land. In fact it's a barbed wire fence. He admitted to permitting mailbox posts, electric fences, growing crops for certain farmers, hedge rows, and trees. In fact, Mr. Bontrager himself has a *huge* tree in the roadway. All of these matters were treated differently than the Petitioner's operation.

It appears to be okay for farmer A to have a barbed wire fence in the roadway. It is okay for farmer B to have an electric fence in the roadway. It is okay for farmer C, D, E, and F to have posts with mailboxes and newspaper boxes with posts thereon. It is okay for the Respondent Trustee, Mr. Bontrager, to have a "huge" tree in the roadway, but it is not okay for the Petitioner to put up his fence posts.

These are the "special circumstances" the Kansas Supreme Court referred to in *State, ex rel. Miller v. Rohleder,* 208 Kan. 193, in which equity can and will interfere when public officials act in excess of their authority. How can this Court find that the actions of the Respondents Township, Sheriff, and County Attorney were not arbitrary and capricious toward the Petitioner? This type of action violates the standard of review set forth by the Kansas Court in *City of Emporia v. Humphrey,* 132 Kan. 682, especially in light of the facts herein where the Respondents took the posts and boards down with chain saws, drove them to a dump, and burned them to the tune of a minimum of $150.00, excluding time and labor. This Court can and should find such action on the part of the Respondents as violative of the Petitioner's constitutional rights as outlined above.

The Respondent Township, the Trustee, and Respondent O'Sullivan violated K.S.A. 80-306 which mandates as follows:

> "The township trustee shall prosecute in the name of his or her township *all* violations of the different road laws, or *any* provisions thereof; and in such prosecution it shall be the duty of the county attorney to act on behalf of the township."

Here, there was a total failure of any kind of prosecution, save the harassing of Petitioner. There was a picking and choosing on the part of both Respondents which is not allowed by this statute.

No one from the Respondent Township's office or the County Attorney's office, or Judge Brown even wanted to hear from Petitioner his proffer of evidence, after the December 3, 1981, hearing, that a disabled vehicle was not endangered by Petitioner's posts. That bid of evidence would have dissolved the temporary injunction as per Judge Brown's order.

These last two points simply show a cavalier attitude on the part of the Respondents as well as the Courts in denying Petitioner's due process and equal protection rights.

CONCLUSION

For the reasons and arguments stated herein, the Petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Kansas, to review that Court's decision which, in effect, affirmed the decisions of the Kansas Court of Appeals and the trial Court denying the constitutional rights of the Petitioner.

Respectfully submitted,

RICHARD J. ROME
(Counsel of Record)
Attorney at Law
421 West First, Suite C
Post Office Box 964
Hutchinson, Kansas 67504-0964
(316) 662-3383
Attorney for Petitioner

APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 84-57323-A

Douglas M. Sumner, Appellant,

v.

Yoder Township, et al., Appellees.

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date January 24, 1986

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

No. 57,323

IN THE
COURT OF APPEALS OF THE STATE OF KANSAS

DOUGLAS M. SUMNER,
Plaintiff/Appellant;

v.

YODER TOWNSHIP,
Defendant/Appellee/Cross-Appellant;

KENNETH BONTRAGER, ELDON R. BONTRAGER, and DEAN EALES,
Defendants/Appellees;

and

JOSEPH P. O'SULLIVAN and JAMES FOUNTAIN,
Defendants.

MEMORANDUM OPINION

Appeal from Reno District Court: WILLIAM F. LYLE, JR., judge. Opinion filed November 21, 1985. Affirmed.

Richard J. Rome, of Hutchinson, for the appellant.

Gerald L. Green, of Gilliland, Hayes, Dillon & Green, P.A., of Hutchinson, for the appellees and cross-appellant.

Before REES, P.J., C. FRED LORENTZ, District Judge, Assigned, and JOHN W. BROOKENS, District Judge Retired, Assigned.

Per Curiam: Affirmed under Rule 7.042 (b), (d) and (e) (235 Kan. lxxiv).